

REMARKS

By the above actions, claim 1 has been amended and non-elected claims 34-60 canceled subject to applicants' right to file a divisional application relative thereto. In view of the action taken and the following remarks, further consideration of this application is now requested.

Before proceeding further, it is noted that on February 15, 2005, the Examiner was contacted by telephone since the Action Summary form had the boxed checked indicating that the Examiner's Action was being made final, but the body of the Action did not so indicate. The Examiner indicated that the Action was not intended to be final and that a new Action Summary form would be sent without the noted box being checked. The new form has not been received but this response is being filed on the basis of the Examiner's statement that her Action was a non-final Office Action.

In view of the Examiner's indication of allowable subject matter relative to claims 7 and 8, these claims have been rewritten in independent form. Thus, formal allowance of these claims is in order.

With the exception of claims 7 & 8, all of the claims to the elected specie have been rejected both under the judicially created doctrine of obviousness type double patenting and under 35 U.S.C. § 102 based upon the Leysieffer et al. patent (hereafter, Leysieffer). Both of these rejections are inappropriate and should be withdrawn for the following reasons.

Firstly, the Examiner's modification of her rejection to now rely on elements 21-25, particularly parts 22, 25 as meeting the elastic flange recitation of the present application is simply not understandable. Element 22 of the Leysieffer patent is a "cylindrical sleeve part" of first leg 12 has a length substantially equal to the bore which crosses the wall of the auditory canal and is intended to be disposed therein and element 25 is a wall of second leg 15 which, together with flanges 23 & 24, is "engageable against a side of the wall of the auditory canal which faces skin of the auditory canal" so as to produce fixation of the housing by a clamping action, not frictional engagement with the wall of the bore. Furthermore, elements 24 & 25 could never engage within the bore through the wall of the auditory canal due to the size and configuration of the leg 15 relative to leg 14 and because cylindrical sleeve part 22 has a

length substantially equal to that of the bore which crosses a wall of the auditory canal. Additionally, the elements 24 & 25 are rigid, not elastically flexible.

So as to make it readily apparent that it is impossible for the structure of the Leysieffer patent to structurally or functionally be equated to the present invention, either by disclosure or inherency, claim 1 has been amended to recite that not only does arrangement of the present invention have a cylindrical portion that, at least in an implanted state of the fixation element, has an axial length corresponding to the axial length of said bore, like that of cylindrical portion 22 of Leysieffer, but that the elastic region of increased diameter of the cylindrical portion "is located at least in an *intermediate region of its axial length*, said elastic region *contacting*, in the implanted state of the fixation element, a wall of *said bore at least in an intermediate region of its axial length*." Most certainly, none of the elements 23, 24, 25 are positioned as now recited nor are they capable of engaging an intermediate region of a bore through a wall of the auditory canal as now claimed as a characteristic of the present invention.

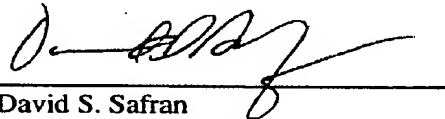
Thus, not only does the Leysieffer patent teach that an entirely different surface is engaged from that specified in applicants' claims and one which would not render obvious the use of a resilient enlargement inside of the bore, but no reason exists for one of ordinary skill to locate the flange of the Leysieffer patent within the bore. This is particular the case since the present invention produces fixing by "friction," while the Leysieffer patent teaches fixing by clamping of the element between the resiliently deformable flange 23 and the rigid flanges 24, 25. with friction playing no role in the securement. This failure of the Leysieffer patent to teach or even suggest the present invention defined by claim 1 is reflected both in the disclosure of the Leysieffer patent, as noted above, and the claims of that patent as apparent from the appended side-by-side comparison of claim 1 of both patents, particularly the bold italicized portions thereof.

For all of these reasons, it is submitted that the claims of this application define subject matter that is neither an obvious variation of that which is claimed in the Leysieffer patent nor anticipated or rendered obvious by anything derivable from the disclosure of the Leysieffer patent. Therefore, withdrawal of the outstanding rejections is in order and is

requested, along with allowance of this application in the absence of any new and more pertinent prior art being discovered.

While the present application is now believed to be in condition for allowance, should the Examiner find some issue to remain unresolved, or should any new issues arise, which could be eliminated through discussions with applicant's representative, then the Examiner is invited to contact the undersigned by telephone in order that the further prosecution of this application can thereby be expedited.

Respectfully submitted,



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Comparison of Applicants' Claim 1 & Claim 1 of U.S. Patent 5,999,632

Applicants' Claim 1

1. A fixation element for an implantable microphone, wherein the fixation element comprises an essentially cylindrical portion adapted to be inserted into a bore which crosses a wall of the auditory canal of a user, said cylindrical portion, at least in an implanted state of the fixation element having an axial length corresponding to the axial length of said bore, and surrounding an outer circumferential portion of a housing part of the microphone, which housing part is provided with a sound receiving member, *wherein said cylindrical portion includes at least one elastic region of increased diameter that is located at least in an intermediate region of its axial length, said elastic region contacting, in the implanted state of the fixation element, a wall of said bore at least in an intermediate region of its axial length* and providing, by elastic restoring forces, for a friction which is sufficiently high to fix said cylindrical portion in at least one of the two axial directions of said bore.

Claim 1 of U.S. Patent 5,999,632 I

1. Fixation element for an implantable microphone having

a cylindrical housing part provided with an acoustic membrane which is insertable into a hole which crosses a rear bony wall of the auditory canal of a user, said fixation element comprising

a sleeve which has a cylindrical sleeve part for surrounding the cylindrical housing part of the implantable microphone, in use, and

*which has projecting, elastic flange parts which are engageable against a side of the wall of the auditory canal which faces skin of the auditory canal.*